

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MARY STRUBLE, As Conservator for C.S.,
Plaintiff,
vs.
FALLBROOK UNION HIGH SCHOOL
DISTRICT, a Local Educational Agency,
Defendant.

CASE NO. 07cv2328-LAB (CAB)

**ORDER ADOPTING REPORT &
RECOMMENDATION AS
MODIFIED**

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, provides federal funding to states “to ensure that all children with disabilities have available to them a free appropriate public education.” 20 U.S.C. § 1400(d). IDEA requires states who receive federal funding to provide disabled children with a “free appropriate public education” (FAPE). 20 U.S.C. §§ 1401(8) & 1412(a)(1). A school district is required to offer disabled students an appropriately-designed FAPE that provides a meaningful benefit. *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 432–33 (9th Cir. 2010). The state, through the school districts, and a student’s parents must cooperatively develop an individual education program (IEP) for each qualified child. 20 U.S.C. § 1414(d).

If the parents are unsatisfied with the IEP offered by the state, parents may request an impartial due process hearing through the state educational agency to review the IEP and order a more appropriate educational program. 20 U.S.C. § 1415(f). If the parents, or the

1 school district, objects to the results of the agency hearing, then—and only then—they may
2 appeal the case to a State court or U.S. district court. 20 U.S.C. § 1415(i)(2). That court
3 must review the administrative record, hear additional evidence upon request, and “shall
4 grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(2)(B)(iii). The
5 parties may not bring their case before the courts until they exhaust these administrative
6 procedures. *Id.*

7 This case consists of a complaint filed by Plaintiff Mary Struble, the conservator and
8 mother of a young man (“C.S.”), who alleges that the Defendant failed to provide a FAPE
9 and seeking that C.S. be placed at the Fusion Learning Center , a nonpublic school which
10 has not been certified by the state as an appropriate school for children with disabilities. The
11 complaint seeks to modify the *remedy* prescribed by the administrative law judge (ALJ) who
12 conducted an administrative due process hearing and agreed with Struble that the defendant
13 failed to provide C.S. a FAPE. After she filed the complaint, Struble placed her son with
14 Fusion, but does not seek reimbursement of those costs in this complaint. The complaint
15 doesn’t say what whether C.S. continued at Fusion, or what his status is now, but the Court
16 assumes the parents continue to seek compensatory education for him. In addition, the
17 Defendant, Fallbrook Union High School District, filed a counterclaim seeking to reverse the
18 decision by the ALJ.

19 I. Facts and Procedural History

20 The Court referred this case to Magistrate Judge Cathy Bencivengo, who issued her
21 report and recommendation (“R&R”), thoroughly canvassing the facts and procedural history.
22 The Court **ADOPTS** the R&R’s findings, which in summary establish the following. C.S.
23 qualifies for special education because he is autistic. He attended Fallbrook High School
24 from mid-2004 until approximately May 2007. In May 2007, about a month before the end
25 of his senior year, C.S.’s parents pulled him out of school based on the recommendation of
26 C.S.’s psychiatrist. Just before May 2007, Struble first learned that the Student was not on
27 a high school “diploma” track, but rather on a “certificate of

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1 completion” track. She claims the District staff never informed her that C.S. would not
2 receive a diploma even if he successfully completed all his classes.

3 In June 2007, the parties met to discuss C.S.’s IEP, during which the parties quarreled
4 over whether Struble knew that C.S. was on a “certificate of completion” track. At the
5 meeting, Defendant offered C.S. two options: (1) to return to Fallbrook High School as a
6 “super senior,” or (2) to attend the District’s transition program, located on the Fallbrook High
7 School campus. Neither option permitted C.S. to graduate with a diploma, and “the
8 discussion focused around why C.S. was not currently capable of attaining a diploma.” (Doc.
9 No. 1, *ALJ Decision*, at 14).

10 Unsatisfied with this result, Plaintiff filed a due process complaint against the District
11 with the California Office of Administrative Hearing, Special Education Division (“OAH”),
12 alleging that Defendant failed to provide C.S. with a FAPE. The complaint accused the
13 District of fifteen specific failures over the course of C.S.’s junior and senior years. On
14 November 20, 2007, the ALJ ruled in Plaintiff’s favor as to three specific allegations: (1)
15 failure to provide parents with options for C.S. graduation while C.S. was in the eleventh
16 grade; (2) failure to write any handwriting goals while C.S. was in the eleventh grade; and
17 (3) failure to provide parents or C.S. with options for graduation, and/or predetermination of
18 placement while C.S. was in the twelfth grade. The ALJ ruled in the District’s favor on the
19 remaining twelve issues. Even so, due to the District’s failure to provide a FAPE to C.S.,
20 some form of compensatory education was appropriate. The ALJ ordered the parties to
21 meet and discuss options which permitted C.S. to work toward a diploma, including
22 placement at a nonpublic school. The order specifically permitted the parties to file a new
23 impartial due process complaint regarding any proposal made at that meeting. Struble
24 considered this remedy unacceptable because she hoped to place C.S. at Fusion and have
25 the District pay the tuition. By this time, the parties had lost rapport with one another and
26 Struble believed the District had essentially abandoned any hope of C.S. graduating high
27 school with a diploma.

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1 On December 13, 2007, Plaintiff filed this complaint in the District Court. The parties
2 then met on February 7, 2008, as ordered by the ALJ, to discuss a new IEP. The District
3 offered to allow C.S. to participate in the high school curriculum leading to a diploma, with
4 a proposed graduation date of June 10, 2011. Plaintiff rejected this offer, requesting that the
5 District reimburse the family for the past and future costs of sending C.S. to Fusion.
6 Defendant refused because, according to the District, Fusion could not provide a FAPE
7 because Fusion was not certified by the state. It is not clear whether C.S. continued his
8 education at Fusion.

9 The District also filed a counterclaim, essentially challenging the ALJ's findings that
10 the District had failed to provide a FAPE to C.S.. The R&R recommends that the Court:

- 11 1. Dismiss the District's counterclaim with prejudice in its entirety;
- 12 2. As to the complaint, stay the action and remand the matter to the OAH for a
13 final determination by a hearing officer as to the following two issues: (A)
14 whether the new IEP (presented at the 2/7/08 IEP meeting) violated the IDEA
15 and, if so (B) whether the private [unilateral parent] placement at Fusion was
16 appropriate under the Act?;
- 17 3. Declare that Struble was the prevailing party in the ALJ hearing; and
- 18 4. Declare that Struble waived her right to appeal the ALJ's decision as to twelve
19 of the fifteen issues contained in the original complaint.

20 Both parties object to the R&R. Struble objects only to the second recommendation,
21 and requests that this Court hold a hearing and make a final determination on the case,
22 rather than sending the case back to the OAH to start again. The District objects to the first
23 and third recommendations, asking the Court to overturn the ALJ's findings and declare the
24 District the prevailing party on all issues. In addition, the District objects to the way the R&R
25 frames the issues for review in the second recommendation. Neither party objects to the
26 fourth recommendation.

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1 **II. Standard of Review**

2 **A. *De Novo Review of the R&R***

3 A district court has jurisdiction to review a Magistrate Judge's report and
 4 recommendation on dispositive matters. Fed. R. Civ. P. 72(b). "The district judge must
 5 determine de novo any part of the magistrate judge's disposition that has been properly
 6 objected to." Rule 72(b)(3). "A judge of the court may accept, reject, or modify, in whole or
 7 in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. §
 8 636(b)(1)(C). The Court reviews *de novo* those portions of the R&R to which specific written
 9 objection is made. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). In
 10 this case, both parties made specific objections, so the Court reviews those issues de novo.

11 **B. *Review of the ALJ Opinion***

12 When reviewing a complaint under the IDEA, "the court shall receive the records of
 13 the administrative proceedings; shall hear additional evidence at the request of a party; and
 14 basing its decision on the preponderance of the evidence, shall grant such relief as the court
 15 determines is appropriate." 20 U.S.C. § 1415(2)(C). A full de novo review is inappropriate.
 16 *J.W.*, 626 F.3d at 438. This is "an unusual formulation of the standard for district court
 17 review of an administrative decision." *Capistrano Unified School District v. Wartenberg*, 59
 18 F.3d 884, 890 (9th Cir. 1995). The statutory requirement that the district court should
 19 "receive the records of the administrative proceedings" is not a simple matter of reading the
 20 record; rather, the Court must give the administrative record "due weight," which is to say
 21 some amount of deference *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v.*
 22 *Rowley*, 458 U.S. 176, 206 (1982). How much deference is a matter of discretion for the
 23 courts. *Gregory K. v. Longview Sch. Distr.*, 811 F.2d 1307, 1311 (9th Cir. 1987). The
 24 amount of deference accorded the hearing officer's finding increases where they are
 25 "thorough and careful." *A.M. ex rel. Marshall v. Monrovia Unified Sch. Dist.*, 627 F.3d 773,
 26 778 (2010) (citation omitted). In the end the Court must "read the administrative record,
 27 consider [any] new evidence, and make an independent judgment based on a

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1 preponderance of evidence and giving due weight to the hearing officer's determinations."
2 *Wartenberg*, 59 F.3d at 892.

3 **III. Discussion**

4 **A. The District's Objections to the R&R**

5 The District objects (1) to the finding that the ALJ thoroughly evaluated all of the
6 evidence and carefully assessed the credibility of all of the witnesses, including Struble; (2)
7 to the R&R's failure to reverse the ALJ's findings and conclusions on the three issues on
8 which Struble originally prevailed; (3) to the finding that Struble was the prevailing party at
9 the hearing before the ALJ; and (4) to the way the R&R frames the issues to be decided
10 during a possible future administrative due process hearing.

11 1. *The ALJ thoroughly evaluated the evidence in the record and carefully assessed the*
12 *credibility of all the witness.*

13 The District argues that the ALJ did not thoroughly evaluate the evidence or reach a
14 careful decision and points to four pieces of evidence the ALJ allegedly failed to consider.
15 First, the District states that the "ALJ took great pains not to allude to the fact that [C.S.] has
16 been conserved and ignored the implications of this fact." (Doc. No. 46 at 4.) It argues that
17 because Struble was C.S.'s *conservator*, and not just his parent, it is much more likely that
18 Struble understood C.S. was not on a diploma track. This is because conservators must
19 prove they are responsible and, by implication, they are more likely to pay attention to the
20 difference between a certificate of achievement and a diploma. (Doc. No. 46 at 5.) This
21 objection is rooted in the ALJ's decision not to admit a declaration of the District's Director
22 of Special Education into evidence. The District does not now argue that the ALJ's decision
23 not to admit the evidence was incorrect, but rather that the ALJ was on notice that the District
24 believed Struble's role as conservator was relevant. Therefore, the argument goes, the
25 ALJ's failure to consider this evidence in the decision shows the ALJ did not carefully
26 consider the evidence.

27 The Court is not convinced that this shows carelessness. The ALJ published a
28 38-page decision which included 158 factual findings. These findings lay out not only the

1 evidence presented but also the ALJ's thought process while weighing the evidence. (For
2 examples of the ALJ weighing evidence see, e.g., Doc. No. 1, ¶¶ 28–29, 47–53, 65, 83–85.)
3 In cases, like this one, where there is an extensive record and testimony, the ALJ is not
4 required to mentioned every detail when discussing the record, especially details which are
5 not particularly relevant. The District does not elaborate on why Struble's conservatorship
6 is relevant, other than to mention that "the implications" are relevant to "the issues of whether
7 Plaintiff understood that her son was not diploma bound." (Doc. No. 46 at 5.) The Court
8 does not find this detail helpful because the connection between Struble's conservatorship
9 and her knowledge of the difference between a "diploma" track and "certificate of
10 achievement" track is tenuous. The ALJ's failure to discuss the conservatorship does not
11 show that the ALJ was less than thorough and careful.

12 The second piece of evidence are "results of [two] tests of achievement that were
13 administered to [C.S.] in the spring of his senior year by the District and by an independent
14 evaluator chosen by parents in the summer following his senior year." (Doc. No. 46 at 6.)
15 The test results showed that C.S. struggled in both mathematics and reading. The District
16 uses this evidence as proof that C.S. could not graduate with a diploma and that the ALJ's
17 failure to mention this evidence shows carelessness. This argument fails because the ALJ
18 does discuss both tests (¶¶ 102, 123). In addition, the decision canvasses approximately
19 four years of progress tests and IEP Team evaluations, noting at least 10 tests and progress
20 reports (¶¶ 14, 19, 26, 27, 31, 36, 56, 102, 119, 123) stretching through C.S.'s senior year.
21 Even though the ALJ did not focus on these two achievement tests it does not show the ALJ
22 was careless. On the contrary, it suggests that the ALJ considered all the evidence and
23 made her decision based on the evidence she found most compelling. The Court finds that
24 the ALJ's decision was both thorough and careful as she discussed all the evidence of C.S.'s
25 progress.

26 The District also objected that: "the ALJ accepted Plaintiff's testimony that no one
27 explained to her that [C.S.] would need to take the state's standardized achievement tests
28 in ninth grade in order to obtain a high school diploma. No evidence other than Plaintiff's

1 testimony ever submitted at the hearing that students are required to pass California's
 2 standardized achievement tests in ninth grade in order to obtain a high school diploma and,
 3 in fact, this is not correct. Instead, students must pass the [California High School Exit
 4 Examination.]” (Doc. No. 46 at 6–7 (citations removed).) This argument is puzzling. The
 5 ALJ was merely summarizing the evidence on whether the parents knew about the diploma
 6 track, which included Struble's testimony. The fact that Struble, at the time of the hearing,
 7 thought that the California standardized tests were part of the diploma requirements does
 8 not suggest that the ALJ was careless. In fact, it is evidence that the District did not
 9 adequately communicate the state diploma requirements, suggesting that the District failed
 10 to make the distinction between the “certificate of achievement” track and “diploma” track
 11 clear, just as the ALJ concluded. (Doc. No. 1 at 32, ¶ 10–12.)

12 Finally, the District asserts that the ALJ failed to carefully assess Struble's credibility.
 13 The ALJ took great pains to listen carefully to Struble's testimony and weigh it against other
 14 contrary testimony. (Doc. No. 1 at p. 5, ¶ 11; p. 10 ¶ 34, p. 12, ¶ 47.) This case contains
 15 evidence on both sides of every issue, which is why the ALJ thought it was a close call.
 16 (Doc. No. 1 at 13, ¶ 53 (stating that the evidence only tipped the balance toward the
 17 Plaintiff).) Differences of opinion are common in this type of case, *Marcotte v. Palos Verdes*
 18 *Peninsula Unified Sch. Dist.*, 2009 WL 1873024 at 13 (C.D.Cal., June 29, 2009), and the fact
 19 that the ALJ *could* have reached a different outcome doesn't show her evaluation of the
 20 testimony was careless.

21 2. *The ALJ's findings of fact and conclusions of law in favor of Plaintiff should stand.*

22 Defendant next objects to the R&R's failure to reverse the ALJ's findings and
 23 conclusions on the three issues on which the Plaintiff originally prevailed. The R&R
 24 responds to this argument:

25 As set forth previously, the amount of deference given to the administrative
 26 findings is within the court's discretion and increases when the findings are
 27 “thorough and careful.” *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d
 28 at 891. A court should give substantial weight to the hearing officer's decision
 if the court finds that the decision was careful, impartial, and sensitive to the
 complexities of the issues presented. *Ojai Unified Sch. Dist. v. Jackson*, 4
 F.3d [1467,] 1472 [(9th Cir. 1993)].

Here, the ALJ appears to have carefully considered all of the evidence presented by the parties and has set forth her findings and conclusions in a thorough and well-reasoned 38-page opinion. While there may have been evidence presented that arguably contradicted the plaintiff's testimony, the ALJ appears to have thoroughly evaluated all of the evidence, and carefully assessed the credibility of all of the witnesses, including plaintiff. As a result, this Court declines to reverse the findings and conclusions of the ALJ [on the issues favoring the Plaintiff] and recommends that the counterclaim be dismissed with prejudice in its entirety.

(Doc. No. 44 at 21–22.)

The Court agrees. As discussed above, the ALJ was careful and thorough. The Court places great weight in her conclusions and findings and the Court will defer to those the ALJ's decision on those issues.

3. *The Plaintiff was the prevailing party.*

Plaintiffs originally argued that the District had failed to provide C.S. with a FAPE based on 15 issues. The ALJ eventually found for the District on 12 of those issues, but found for the Plaintiff on 3 issues. However, as discussed, the ALJ's findings of fact and conclusions of law on these issues were correct. Therefore, the Plaintiff should be considered the prevailing party. The Court adopts the R&R's explanation and reasoning:

A party is "prevailing" where it can "point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989), quoted in *Kletzelman v. Capistrano Unified Sch. Dist.*, 91 F.3d 68, 71 (9th Cir. 1996); see also *Tex. State Teachers Ass'n*, 489 U.S. at 792–93 ("The touchstone of the prevailing party inquiry must be the material alteration of the legal relations of the parties. . . ."). "[T]he prevailing party inquiry does not turn on the magnitude of the relief obtained." *Farrar v. Hobby*, 506 U.S. 103, 111 (1992). Rather, a "prevailing party" need only "obtain an enforceable judgment against the defendant from whom fees are sought." *Id.* at 113–14. Accordingly, a prevailing party need not succeed on all issues, but only on "any significant issue." *Parents of Student W.*, 31 F.3d at 1498 (internal quotation marks omitted). Moreover, a prevailing party need not achieve all of the relief claimed, but merely "some of the benefit the parties sought in bringing the suit." *Id.* (internal quotation marks omitted).

Here, plaintiff was the prevailing party at the ALJ hearing, because plaintiff was afforded significant relief that materially altered the relationship of the parties. Student went from a situation where he was only provided with a "Certificate of completion" option, to an order that the IEP team devise a plan to put Student on the "diploma" track. The fact that the ALJ ruled in favor of the District on other issues does not change the fact that plaintiff prevailed at the ALJ hearing.

(Doc. No. 44 at 22–23.)

1 4. *The District's objections to the way the R&R framed the issues are sustained.*

2 The District's final objection is about how the R&R frames the issues to be decided
3 at a possible future due process hearing. The R&R frames one issue by asking "did the new
4 IEP (presented at the 2-7-08 IEP meeting) violate the IDEA." The District urges the Court
5 to re-frame the issue as "whether the February 7, 2008 IEP placement is appropriate [under
6 the IDEA]." (Doc. No. 46, p. 11.) Plaintiff did not object to the way Defendant framed the
7 issue. The District argues that its way of framing the issue is more narrowly tailored to the
8 facts, and the Court agrees. In addition, the District argues that characterizing the IEP
9 meeting as merely "presenting" the parents with a new IEP suggests that the plan violated
10 the IDEA because school districts are required to develop an IEP with the input of the
11 parents. The R&R is **MODIFIED** in this way to re-frame the second recommendation.

12 **B. *Struble's Objections to the R&R***

13 Struble makes several objections aimed at the R&R's recommendation to remand the
14 case to the OAH to determine whether the new IEP (discussed at the Feb. 7, 2008 meeting)
15 violated the IDEA and, if so, whether the parent's decision to place C.S. at Fusion was
16 appropriate. Struble asks the Court, as an alternative, to hold a hearing on the issues and
17 make a final ruling.

18 1. *The ALJ did not violate the IDEA by delegating the award of compensatory education*
19 *to the IEP team.*

20 Struble's first objection is that the remedy the ALJ ordered was illegal. Struble argues
21 that by ordering the parties to meet again and develop a new IEP which allowed C.S. to
22 graduate with a diploma, rather than ordering a placement for C.S., the ALJ effectively
23 delegated her authority to the District, which is prohibited by statute. The IDEA due process
24 hearing "may not be conducted by an employee of the State educational agency or the local
25 educational agency involved in the education or care of the child." 20 U.S.C. § 1415(f)(3).
26 The ALJ may not delegate its authority to craft a remedy to the very employees who violated
27 the IDEA in the first place. *Reid v. District of Columbia*, 401 F.3d 516, 526 (D.C. Cir. 2005)
28 ("Under the statute, the hearing officer may not delegate his authority to a group that

1 includes an individual specifically barred from performing the hearing officer's functions.")

2 As the R&R explains, *Reid* is distinguishable:

3 In *Reid*, a hearing officer concluded that the school district had denied the
 4 student a FAPE, and ordered 810 hours of compensatory education. The
 5 hearing officer also empowered the student's IEP team to "direct []"
 6 implementation of the award. "The services are to be reduced or
 7 discontinued," he added, "on the decision of the IEP team that Minor no longer
 8 needs or is not benefitting from this compensatory education. The team's
 9 decision that [Minor] no longer needs or is not benefitting from this award of
 10 compensatory education services will terminate this award. . . ." 401 F.3d at
 520. . . .

8 Here, however, the ALJ's decision does not violate *Reid*. The ALJ's decision
 9 does not allow the IEP team to "reduce or discontinue," *id.*, the compensatory
 10 education award. Rather, the ALJ is specific that the District was to hold
 another IEP meeting to devise a placement that would permit the Student to
 work toward a diploma.

11 (R&R at 19.) The reason the ALJ ordered a new meeting, rather than placing C.S. in an
 12 appropriate school was because the ALJ did not have sufficient evidence to make such a
 13 placement. (Doc. No. 1 at p. 36, ¶ 31–32.) The ALJ's remedy was appropriate because it
 14 did not give the IEP team authority to change or reduce the remedy in any way. Rather, the
 15 remedy forced the parties to develop a new IEP which gave the Plaintiff what she wanted—a
 16 path for C.S. toward a diploma.

17 2. *Prospective placement into Fusion is not an available remedy.*

18 Struble asks the Court to hold a hearing on the issue of compensatory education
 19 because she seeks to have C.S. placed at Fusion. (Doc. No. 45 at 6.) First, Struble argues
 20 that she need not exhaust her claims further to receive relief. The Court agrees that on the
 21 question whether to order C.S. to be placed at Fusion, Struble has exhausted her claims.
 22 The District argues that further exhaustion is required, but its argument addresses whether
 23 the District must reimburse Struble for tuition costs she voluntarily made to Fusion which, in
 24 turn, depends on whether the District failed to provide a FAPE at the February 7, 2008 IEP
 25 team meeting. (Doc. No. 49 at 2–3.) The parties agree, however, that reimbursement is not
 26 at issue in this case (*see id.* and Doc. No. 45 at 5), so the District's argument is beside the
 27 point.

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1 Second, Struble argues that the Court may (or perhaps must) place C.S. at Fusion.
 2 The R&R goes into great detail discussing whether prospective placement at a non-certified
 3 private school is permitted:

4 Under 20 U.S.C. § 1412(a)(10), a State is eligible for assistance under the
 5 IDEA if the State submits a plan that provides assurances to the Secretary that
 6 the State has in effect policies and procedures to ensure that the State meets
 certain conditions with regard to the placement of children in private schools.

7 With regard to children placed in, or referred to, private schools by public agencies, the IDEA
 8 provides:

9 (B) Children placed in, or referred to, private schools by public agencies

10 (i) In general

11 Children with disabilities in private schools and facilities
 12 are provided special education and related services, in
 13 accordance with an individualized education program, at
 14 no cost to their parents, if such children are placed in, or
 15 referred to, such schools or facilities by the State or
 16 appropriate local educational agency as the means of
 carrying out the requirements of this subchapter or any
 other applicable law requiring the provision of special
 education and related services to all children with
 disabilities within such State.

17 (ii) Standards

18 In all cases described in clause (i), the State educational
 19 agency shall determine whether such schools and
 20 facilities meet standards that apply to State educational
 21 agencies and local educational agencies and that
 children so served have all the rights the children would
 have if served by such agencies.

22 20 U.S.C. § 1412(a)(10)(B) (emphasis added).

23 The IDEA defines a FAPE as follows:

24 The term “free appropriate public education” means special
 25 education relates services that

26 (A) have been provided at public expense, under public
 supervision and direction, and without charge;

27 (B) meet the standards of the State educational agency;

28 (C) include an appropriate preschool, elementary school, or
 secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title

20 U.S.C. § 1401 (9) (emphasis added).

Finally, the California Education Code provides:

(a) A hearing officer may not render a decision that results in the placement of an individual with exceptional needs in a nonpublic, nonsectarian school, or that results in a service for an individual with exceptional needs provided by a nonpublic, nonsectarian agency, if the school or agency has not been certified pursuant to Section 56366.1.

(b) A hearing officer shall consider Sections 56365, 56366, and 56366.1 during a due process hearing concerning an issue of placement of an individual with exceptional needs in a nonpublic, nonsectarian school, or services for an individual with exceptional needs provided by a nonpublic, nonsectarian agency.

Cal. Education Code § 56505.2 (emphasis added).

These authorities make clear that school districts and hearing officers in California cannot place students prospectively in non-certified nonpublic schools. But if a parent has unilaterally placed a student in a nonpublic school and is seeking retroactive reimbursement (as opposed to prospective placement), then such reimbursement may be awarded under certain circumstances even if the nonpublic school does not meet state certification requirements.

Struble objects and argues that whether or not the ALJ had the authority to grant relief the Court has wide authority to craft an equitable remedy. The district court has the power to “grant such relief at [it] determines is appropriate.” 20 U.S.C. § 1415(i)(2)(C)(iii). “The IDEA’s authorization to grant ‘appropriate relief’ encompasses the full range of equitable remedies and therefore empowers the court to order adult compensatory education if necessary to cure a violation.” *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489 (9th Cir. 1994). The Court’s authority may be broad, but at the same time the Court considers it inadvisable to award a remedy was not available at the administrative proceeding. Rather, the Court will conform its orders to the legislative intent to protect the State’s interest in certifying public schools receiving public funds. The plain language of the statute requires

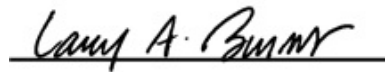
1 prospective placement in a certified private school, and it would be inappropriate to reject
2 this restriction and order placement at a non-certified nonpublic school.

3 **IV. Conclusion and Order**

4 The District's counterclaim is **DISMISSED WITH PREJUDICE** in its entirety. The
5 plaintiff's complaint is **STAYED** and **REMANDED** to the OAH for a final determination by a
6 hearing officer as to the following two issues: (A) whether the February 7, 2008 IEP
7 placement was appropriate under the IDEA and, if not, (B) whether the private parental
8 placement at Fusion appropriate under the Act. The Court finds the Plaintiff was the
9 prevailing party in the ALJ hearing. The Court also finds the Plaintiff has waived her right
10 to appeal the ALJ's decision that the Defendant prevailed on twelve specific issues which
11 the Plaintiff did not appeal.

12 **IT IS SO ORDERED.**

13 DATED: January 27, 2011

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15 **HONORABLE LARRY ALAN BURNS**
16 United States District Judge
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